Supreme Court of the United States

October Term, 1954

No. 38

UNITED STATES OF AMERICA,

Petitioner,

—v.—

PETER BROWN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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Opinions Below

The opinions below are adequately set forth in the brief for the United States.

Jurisdiction

The jurisdictional requisites are adequately set forth in the brief for the United States.

Statutes Involved

The Federal Tort Claims Act, 28 U. S. C. 1346(b), and Section 31, Act of March 28th, 1934, 48 Stat. 526, 38 U. S. C. 501a, are set forth in the Petitioner's Brief at pages 2-3.

In addition, the Federal Tort Claims Act provides:

> (28 U. S. C. A. 2674). The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages * * *.
>
> (28 U. S. C. A. 2680). Exceptions.
>
> The provisions of this chapter and Section 1346(b) of this title shall not apply to:
>
> (a) Any claim based upon an act or omission, of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.
>
> (b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.
>
> (c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.
>
> (d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Any claim arising from the injury to vessels, or to the cargo, crew, or passengers of vessels, while passing through the locks of the Panama Canal or while in Canal Zone waters.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Railroad Company. June 25, 1948, c. 646, 62 Stat. 984, amended July 16, 1949, c. 340, 63 Stat. 444.

Question Presented

Whether a discharged veteran, not subject in any way to military discipline, who receives treatment at a Veterans Administration hospital, may maintain an action against the United States under the Federal Tort Claims Act for injuries sustained by him as a result of the negligence of Government employees.

Statement

This is an action brought under the Federal Tort Claims Act to recover for personal injuries sustained by the respondent when he was a patient at a Veterans Administration Hospital.

The respondent had served in the Army Air Force from October 27, 1942, to August 6, 1944. He was honorably discharged on the latter date with a service connected disability, having been injured in his left knee. Upon his discharge, he was able to walk, but upon any sudden or strenuous movements, his left leg would become dislocated. Six years later, on March 8, 1950, he was operated upon by the Veterans Administration for the purpose of "cleaning up" the knee joint. His leg continued to dislocate frequently, however (R. 7, 8).

Pursuant to his status as a veteran, the respondent was admitted to the Veterans Administration Hospital at 130 Kingsbridge Road, Bronx, New York, on October 1, 1951, for examination and possible treatment. It was decided at that time that another operation should be performed on his left knee for the purpose of preventing the leg

from dislocating. The operation was performed on October 4, 1951. It was to be a "bloodless" operation, requiring the application of a tourniquet on the left thigh. The tourniquet was applied by an operating room attendant in the employ of the Veterans Administration. The tourniquet was defective in that the pressure gauge was not registering and an excessive amount of pressure was applied to the respondent's leg. The attendant should have realized that the tourniquet was defective as soon as it was applied, but he did not (R. 8).

As a result of the excessive pressure, the nerves in the respondent's leg were seriously and permanently injured. The respondent was confined to the hospital for approximately sixteen weeks thereafter, and for a long period after that was required to report to the hospital each day for treatment. He lost all sensitivity in portions of his left leg below the knee, and he has lost control of some of the muscles in that portion of the leg. He is unable to walk without an orthopedic brace and it appears that he will never regain the full use of his leg (R. 8).

The respondent received a pension from the Government upon his discharge. This pension was increased as a result of the injury he sustained in the Veterans Administration Hospital in 1951 (R. 5).

The respondent filed his complaint against the United States under the Federal Tort Claims Act, on April 14, 1952, in the United States District Court for the Southern District of New York. After answering, the United States moved to dismiss the complaint, "for failure to state a claim upon which relief can be granted" (R. 1, 2, 3, 6).

The District Court granted the motion, noting that there was a square conflict of authority between the circuit courts on the pertinent question (R. 13).

The respondent herein appealed to the Court of Appeals for the Second Circuit, and that Court reversed (R. 16-19).

Summary of Argument

I.

The respondent has brought this action under the Federal Tort Claims Act for injuries that he sustained at the hands of Veterans Administration employees. Whether or not he can recover is a question of statutory construction. Both the language and the history of the Federal Tort Claims Act provide overwhelming evidence that Congress intended the Act to apply to the respondent's claim.

The language of the Act is general in scope, allowing a recovery "for personal injury or death caused by the negligence or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment * * *" 28 U. S. C. 1346(b). The act itself contains twelve exceptions, none of which affect respondent's claim.

The history of the Tort Claims Act is further convincing proof that Congress did not intend to exclude respondent's claim from its applicability. The Tort Claims Act was passed in 1946, at a time when Congress was unquestionably cognizant of the rights and remedies of veterans. Had Congress intended to exclude from the Act a claim by a discharged veteran who was injured through the negligence

of a Veterans Administration hospital employee it would have done so in the Act itself. A specific exception, excluding from the provisions of the Act recipients of veterans compensation was deliberately stricken from the Federal Tort Claims Act when it was enacted into law.

This court, in *Brooks* v. *United States*, 337 U. S. 49, made it clear that the receipt of veterans compensation did not constitute a bar to the bringing of an action under the Tort Claims Act. The court allowed a recovery to a serviceman who was injured by a Government truck while he was on furlough. The court said that "were the accident incident to the Brooks' service, a wholly different case would be presented." 337 U. S. 49, 52.

This "wholly different case" came to the court in the three cases decided in *Feres* v. *United States*, 340 U. S. 135. The *Feres* cases all involved claimants who had been injured while on active duty and not on furlough, and whose injuries had been due to the negligence of others in the Armed Forces.

This court denied a recovery under the Tort Claims Act, in the *Feres* cases (1) because such a recovery would be an invitation to the subversion of military discipline, a result that Congress clearly did not intend "in the absence of express Congressional command", (2) because of the non-existence of private liability comparable to that of an Army to its soldiers, and (3) the "distinctively federal" relationship between the Government and members of the Armed Forces, which necessarily negated the existence of liability dependent on local law.

That the *Feres* decision was not based on the alleged exclusiveness of the compensation remedy was made clear

by the conclusion of the Court, as stated in the last paragraph of the *Feres* opinion, and by the specific reaffirmation of *Brooks* decision, which had held that compensation was not the exclusive remedy. The Court, by way of dictum, did say that it was *desirable* to construe the Federal Tort Claims Act, "so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole." 340 U. S. 135, 139. This was not, however, the holding of the case. The Court said nothing else in the *Feres* opinion that can possibly be construed as holding that the Veterans Compensation Statutes constitute an exclusive remedy.

In addition to the specific reaffirmation of the *Brooks* decision, and the bases of its decision clearly stated in the last paragraph, the argument before the Court in *Feres* provides more evidence that *Feres* was not based upon the exclusiveness of the compensation remedy. Briefs filed by the United States in the three *Feres* cases did not even make such an argument.

Similarly, subsequent decisions of this Court do not indicate that *Feres* was based on that ground. The decisions, relied upon by the Government herein, construe *Feres* as applying to soldiers on active duty, and specifically reaffirm the Court's decision in *Brooks* v. *United States*, *supra*, which held compensation *not* to be exclusive.

The *Feres* and *Brooks* decisions are consistent and complementary. They establish clear law. Under them a claimant who was injured while on active duty and not on furlough, due to the negligence of another member of the

Armed Forces may not recover under the Tort Claims Act. Such a recovery, as pointed out by *Feres*, would violate the words of the Act referring to private liability and local law.

The respondent does not come within the *Feres* limitation on the applicability of the Tort Claims Act. His case is a stronger one for recovery than the *Brooks* case itself.

The respondent, at the time of his injury, was a discharged veteran, not subject in any way to military discipline. His claim against the Government is one which would be cognizable under local law if the Government were a private party. The basic elements motivating the Court's opinion in the *Feres* case do not exist in the case at bar.

II.

The United States claims that even if the Court should hold that receipt of Veterans Compensation does not constitute a bar to an action under the Tort Claims Act, Brown's claim is barred by the fact that his injury arose out of and was incident to his service. This we vigorously deny.

The term "incident to service" used by this Court in the *Brooks* and *Feres* opinions must be interpreted in the way the Court intended in those opinions. The Court made it clear that the term, "incident to service" referred to a situation where a "claimant, while on active duty and not on furlough, sustained injury due to negligence of others in the Armed Forces * * *." *Feres* v. *United States*, 340 U. S. 135, 138. It is in such a situation that the unique

conditions of military service and discipline are involved, and it is from such a situation that a claim will be denied under the Tort Claims Act.

Respondent's claim does not arise from such a situation. As a discharged veteran he was in no way on active duty or subject to military discipline. The injury that he suffered at the hands of Veterans Administration employees was a new and different injury from any that he had had before. His injury was not caused by his service "except in the sense that all human events depend upon what has already transpired." *Brooks* v. *United States*, 337 U. S. 49, 52.

Any strained similarity between the phrase "arising out of or in the course of activity incident to service," used by this Court, and the phrase "arising out of and in the course of employment" in Workmens Compensation Law is irrelevant to the question of what this Court intended in the *Brooks* and *Feres* cases.

Denial of Brown's claim on the ground that in a remote way it arose from activity "incident to service" would do more than ignore the basic considerations involved in *Brooks* and *Feres*. It would mean gross inequity and confusion in the law.

I. The Respondent Has a Remedy Under the Federal Tort Claims Act Which Is Not Barred by the Existence or Receipt of Benefits Under the Compensation Statutes.

A. The language and history of the Tort Claims Act indicate that Congress intended the Act to apply to Brown's claim.

The Federal Tort Claims Act, under which the respondent is proceeding, permits actions to be started against the United States for the negligence of Government employees. Its language is general in scope. It provides (28 U. S. C. A. 2680) for twelve specific exceptions. Respondent's action does not fall within any one of these exceptions or a combination of any of them.

As this Court recognized in *Brooks* v. *United States* (1949), 337 U. S. 49, 51, 53, the Act was passed in 1946, at a time when Congress was unquestionably cognizant of the rights and remedies of veterans. If Congress had intended to exclude from its application an action such as the one at bar, it would have written into the Act such an exception.

This Court has stated the rule on many occasions:

> The section contains its own specific provisos and limitations, and these, on familiar principles, strongly tend to negative any other and implied exception. (*Lapina* v. *Williams*, Commissioner, 232 U. S. 78, 92.)

> The implication is that any proceeding not covered by the exception is to be subject to the rule. (*Moore Ice Cream Co.* v. *Rose*, Collector of Revenue, 289 U. S. 373, 377.)

> These special exceptions exclude any other. (*Wood* v. *A. Wilberts' Lumber Co.*, 226 U. S. 384, 390.)

See also *Cunard Steamship Co.* v. *Millen, Secretary of the Treasury*, 226 U. S. 100, 128 and *Equitable Life Assurance Society* v. *Pettus*, 140 U. S. 226, 233.

Furthermore, the exceptions that were written into the Act (excluding, for example, claims arising out of combatant activities of the military or naval forces, or the Coast Guard, during time of war, and claims arising in a foreign country) make it clear that Congress was aware of the present problem when it enacted the Tort Claims Act. This, also, was recognized by the Court in *Brooks* v. *United States*, 337 U. S. 49, 51.

Thus, if the Act is to be accepted as it was written, respondent has a clear right thereunder. This Court has said:

> It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the Act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the Courts is to enforce it according to its terms. (*Caminetti* v. *United States*, 242 U. S. 470, 485; *Mackenzie* v. *Hare*, 239 U. S. 299, 309; *Adams Express Company* v. *Kentucky*, 238 U. S. 190, 199.)

Furthermore, as this Court has pointed out (*Brooks* v. *United States*, 337 U. S. 49, 51-52) when the present Tort Claims Act was first introduced (H. R. 181, 79th Cong., 1st Sess.), it contained the following specific exception:

> (8) Any claim for which compensation is provided by the Federal Employees' Compensation Act, as

> amended, or by the World War Veterans' Act of 1924, as amended.

This exception, had it been retained in the Act would have barred the instant claim. The World War Veterans Act of June 7, 1924, 43 Stat. 607, 38 U. S. C. 421, as amended, is the statute under which respondent has received compensation payments for his hospital-caused injury. This fact is specifically recognized by petitioner at page 31 of its brief.

The exception, however, was dropped from the Tort Claims bill (H. R. 181) when H. R. 181 was incorporated into the Legislative Reorganization Act and enacted into law. In words strikingly pertinent to the case at bar, Judge Parker, Chief Judge of the Court of Appeals for the Fourth Circuit stated:

> This exception was omitted from the Tort Claims Act when the others were written in as Section 421. In my opinion, the Court is without power to write back into an act by interpretation a section which Congress has thus deliberately omitted. The only excuse for reading in an exception by interpretation is that Congress must be presumed to have intended that an exception apply; but Congress could not be presumed to intend that an exception apply, when it deliberately struck the exception from the Act upon its passage. (Dissenting opinion, *United States* v. *Brooks*, 169 Fed. 2d 840, 849.)

Judge Parker's dissent was expressly and specifically approved by this Court when it reversed the decision of the Court of Appeals, *Brooks* v. *United States*, 337 U. S. 49, 51. It follows that this Court can not hold in favor of

the United States in the instant case unless it reverses its own decision in the *Brooks* case and reads into the Tort Claims Act an exception that Congress deliberately struck out.

B. The Brooks decision makes it clear that veterans' compensation is not the exclusive remedy.

This Court has specifically ruled that the receipt of veterans' compensation does not constitute a bar to an action under the Federal Tort Claims Act. *Brooks* v. *United States*, 337 U. S. 49, 53.

In the *Brooks* case, the plaintiff was a member of the Armed Forces on furlough. While driving along the highway, a Government owned vehicle collided with him, and Brooks was injured. Brooks received a pension under the compensation statutes. Despite this, he brought an action under the Tort Claims Act. The Government contended that there was no liability under the Tort Claims Act inasmuch as Brooks had been in the Army and the Compensation Act was a bar to a recovery by him under the Tort Claims Act. This Court rejected that contention, holding that veterans' compensation was not an exclusive remedy and that receipt of compensation did not constitute a bar to an action under the Tort Claims Act. The Court said, at page 50:

> The question is whether members of the United States Armed Forces can recover under the Act (Tort Claims Act) for injuries not incident to their service.

Page 51:

> The statutes and terms are clear. They provide for District Court jurisdiction over any claim

> founded on negligence brought against the United States. We are not persuaded that 'any claim' means 'any claim but that of servicemen'. The statute does contain twelve exceptions. None exclude petitioner's claims.

Page 53:

> Provisions in other statutes for disability payments to servicemen, and gratuity payments to their survivors, 38 U. S. C. 701, indicate no purpose to forbid tort actions under the Tort Claims Act. Unlike the usual Workmen's Compensation Statute, e.g., 33 U. S. C. 905, there is nothing in the Tort Claims Act or the Veterans Laws which provides for exclusiveness of remedy * * *. In the very act we are construing, Congress provided for the exclusiveness of the remedy in three instances, numbers 403(d), 410(b) and 423 (now 28 U. S. C. A. 1346, 2672, 2679), and omitted any provision which would govern this case.

Thus the Supreme Court made it absolutely clear (1) that the Tort Claims Act was of general applicability, (2) that the Veterans Laws are not exclusive remedies, and that (3) even a serviceman may sue the Government under the Tort Claims Act provided his injury did not result from a service-connected activity.

C. The Feres limitation on the applicability of the Tort Claims Act does not extend to the case at bar.

1. *The Feres holding applies only to servicemen on active duty. It is based on factors not present in Brown's claim.*

a. The facts in the Feres cases.

The petitioner herein relies most heavily on *Feres* v. *United States* (1950), 340 U. S. 135. Petitioner argues (page 15, brief for the United States) that the holding in *Feres* is based on the "exclusiveness of the compensation remedy."

Petitioner's position is not supported by the facts in the *Feres* case or by this Court's opinion therein.

The *Feres* case actually involved three cases joined on appeal, *Feres* v. *United States*, 340 U. S. 135, 136, 137. In the *Feres* case itself, "Decedent perished by fire in the barracks at Pine Camp, New York, while on active duty in service of the United States. Negligence was alleged in quartering him in barracks known or which should have been known to be unsafe because of a defective heating plant and in failing to maintain an adequate fire watch."

In *Jefferson* v. *United States*, the second of the three cases, "Plaintiff, while in the Army, was required to undergo an abdominal operation. About eight months later, in the course of another operation after plaintiff was discharged, a towel thirty inches long by eighteen inches wide, marked 'Medical Department U.S. Army' was discovered and removed from his stomach. The complaint alleged that it was negligently left there by the Army surgeon."

In *Griggs* v. *United States*, the third of the three cases, the complaint "alleged that while on active duty he (the

deceased) met death because of negligent and unskiliful medical treatment by Army surgeons."

All three of these cases concerned injuries caused to servicemen on active duty. The Court said, at page 138:

> The common fact underlying the three cases is that each claimant, while on active duty and not on furlough sustained injury due to negligence of others in the Armed Forces.

The Court stated its holding in the last paragraph of its opinion, at page 146:

> We conclude that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service. Without exception, the relationship of military personnel to the Government has been governed exclusively by federal law. We do not think that Congress, in drafting this Act, created a new cause of action dependent on local law for service-connected injuries or death due to negligence. We cannot impute to Congress such a radical departure from established law in the absence of express congressional command. Accordingly, the judgments in the *Feres* and *Jefferson* cases are affirmed and that in the *Griggs* case is reversed.

b. The non-existence of comparable private liability.

The *Feres* decision was in no sense based upon the alleged exclusiveness of the compensation remedy. Rather, it was based on the fact that those injured therein were *in* the Armed Services *on active duty* when the torts occurred. As to such claimants there was no liability under the Tort Claims Act because of (1) the non-existence of private lia-

bility comparable to the alleged liability of an army to its soldiers; (2) the "distinctively federal" relationship between the Government and members of the Armed Forces, which necessarily negated the existence of liability dependent on local law; and (3) the fact that such recovery would be an invitation to the subversion of military discipline, a result that Congress clearly did not intend "in the absence of express congressional command."

The Tort Claims Act provides that "The United States shall be liable * * * in the same manner and to the same extent as a private individual under like circumstances * * *". 28 U. S. C. Section 2674. The Court found this language to be a clear indication that Congress did not intend the Act to cover injuries to members of the Armed Forces on active duty and not on furlough, *Feres v. United States*, 340 U. S. 135, 141, 142, since there was no private liability comparable to that of an Army to its soldiers.

c. The "distinctively federal" relationship between the Government and members of the Armed Forces.

The Tort Claims Act further provides that, "The law of the place where the act or omission occurred" shall govern consequent liability. 28 U. S. C. Sect. 1346(b).

In the *Feres* opinion, this Court said, at pages 143-144:

> The relationship between the Government and members of its armed forces is 'distinctively federal in character,' as this Court recognized in *United States* v. *Standard Oil Co.*, 332 U. S. 301, wherein the Government unsuccessfully sought to recover for losses incurred by virtue of injuries to a soldier. The considerations which lead to that decision apply with even greater force to this case:

> ' * * * To whatever extent state law may apply to govern the relations between soldiers or others in the armed forces and persons outside them or nonfederal governmental agencies, the scope, nature, legal incidents and consequences of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority. See Tarble's Case, 13 Wall. 397; Kurtz v. Moffitt, 115 U. S. 487 * * * ' pp. 305-306.

Thus the Court held that Congress, in providing that local law shall be determinative, made clear its intention not to have the Act cover injuries to servicemen on active duty.

d. Subversion of military discipline.

Running through the entire *Feres* opinion is a consciousness on the part of the Court of the possible subversion of military discipline that would result from allowing claims, under the Tort Claims Act, by servicemen on active duty for torts committed by others in the Armed Services.

Thus, the Court says, at page 141, "We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving." And, in distinguishing the *Brooks'* case, in which the Court allowed a recovery, the Court stated, at page 146, that "Brooks' relationship while on leave was not analogous to that of a soldier injured while performing duties under orders."

It is also significant that in the briefs and argument before this Court in the *Feres* cases, the United States placed primary emphasis on the subversion of military discipline that would result from allowing the *Feres* claims. The government's brief in *United States* v. *Griggs*, No. 31,

Supreme Court, October Term, 1950, sets forth the government's argument as presented in the *Feres, Jefferson,* and *Griggs* cases. The index to this brief displays the following argument headings:

> II. A. Allowing suits on service caused injury or death claims would lead to consequences which Congress should not be presumed to have intended.
>
> 2. It would subject service-caused injury and death claims to judicial scrutiny and thereby impair military discipline.

In advancing this argument the brief of the United States quoted the following language from *United States* v. *Brooks,* 169 Fed. 2d 840, 845, which emphasized:

> * * * the unfortunate results, including the subversion of military discipline, if soldiers could sue the United States for injuries incurred by reason of their being in the Armed Service of their country. If soldiers could sue for such injuries as illness based on the alleged negligence of the company cook or mess sergeant, or if soldiers who contract sickness on wintry sentry duty had a right of action against the government on the allegation of a negligent order given by the Company Commander, then the traditional grousing of the American soldier would result in the devastation of military discipline and morale.

This Court had also displayed its concern with the possible problem of subversion of military discipline in *Brooks* v. *United States, supra.* The Court said, at 337 U. S. 49, 52:

> The government envisages dire consequences should we reverse the judgment. A battle commander's poor judgment, an army surgeon's slip of hand, a

defective jeep which causes injury, all would ground tort actions against the United States.

The Court allowed recovery in the *Brooks* case because Brooks had been on furlough when the accident occurred, because his injury was not incident to his service, and because the question of military discipline was not involved. It denied recovery in *Feres* because such a recovery would be an invitation to the subversion of military discipline.

e. These factors, upon which the Feres decision is based, are not present in the instant claim.

In the case at bar, the respondent, Peter Brown, had been discharged from the Army Air Force in 1944. The injury at the hands of Veterans Administration employees, upon which this action is based, occurred in 1951, some seven years later. The respondent, of course, was not in the Armed Forces at the time of this injury. He was in no way subject to military discipline. In no sense would a recovery by him invite the problem of possible subversion of military discipline.

By the same token, comparable private liability exists in the instant case, whereas it did not exist in the *Feres* cases. Actions against hospitals based upon negligence have been sustained by New York courts even where the hospitals have been charitable institutions, *Sheehan* v. *North Country Community Hospital,* 273 N. Y. 163, 7 N. E. 2d 28, 109 A. L. R. 1197.

Similarly the "distinctively federal" relationship between the Government and members of the Armed Forces that exists where a soldier is injured while on active duty and not on furlough does not exist in the case at bar. The

instant question is one which may be decided "in accordance with the law of the place where the act or the omission occurred." 28 U. S. C. A. 1346(b).

Thus, the *Feres* case is not analogous to the case at bar. In the *Feres* case the Court was confronted with specific language in the Tort Claims Act indicating that the Act was not designed to cover claims by servicemen who were injured while on active duty and not on furlough. There is no such language in the Act barring the instant claim.

Furthermore, in the *Feres* case, allowance of the claims could very well have resulted in the dire consequences of subversion of military discipline. By no stretch of the imagination can such dire consequences result from the allowance of the instant claim.

2. *The Feres holding is not based on the alleged exclusiveness of the compensation remedy.*

a. What the Court said.

In its brief, Petitioner has misstated this Court's conclusion in *Feres* (pp. 14, 16, Brief of the United States).

By intermixing its own words with language of the Court taken out of context, Petitioner has given a false impression. The Court, in the *Feres* opinion, did *not* "answer this question in the affirmative," or "conclude" that compensation was the exclusive remedy.

There is no question that the Court referred to the exisence of the statutory system of remedies against the government. The mere reference to this statutory system does not indicate, however, that the Court's decision is based upon it. *All* that the Court says (that can possibly be construed as its holding) appears at page 139 of its opinion. The Court states:

> This Act, however, should be construed to fit, *so far as will comport with its words*, into the entire statutory system of remedies against the Government to make a workable, consistent, and equitable whole. (Italics supplied.)

Other references to the "comprehensive system of relief" such as those quoted by Petitioner, are either historical in nature or pure dicta.

As previously indicated, a recovery under the Tort Claims Act by a serviceman injured while on active duty, and while not on furlough, did not "comport with" the words of the statute. 28 U. S. C. No. 2674 provides that "The United States shall be liable * * * in the same manner and to the same extent as a private individual under like circumstances * * * " 28 U. S. C. No. 1346(b) provides that "* * * the law of the place where the act or omission occurred" shall govern any consequent liability. These words, in the statute itself, led the Court to conclude that the Tort Claims Act did not cover an injury to a serviceman on active duty.

As we read the *Feres* opinion, the Court was simply saying that it was *desirable* to construe a given statute so as to make it workable, consistent, and equitable *vis-a-vis* other existing statutes. If it was possible to so construe a statute, without doing injustice to its words, then the Court would do it. That was all the Court implied.

In the *Feres* case, it was possible to so construe the Federal Tort Claims Act as applied to a claim arising from an injury to a serviceman on active duty and not on furlough. It was possible to do so in that case because the words of the statute itself appeared to specifically exclude such

claims. The Court did not rule, however, that the Veterans' Compensation Laws were exclusive.

The holding of the *Feres* case is stated in the last paragraph of the opinion, 340 U. S. 135, 146. It is significant that in this paragraph the existence of a compensation system is not even mentioned.

The statutory authority militating against a recovery in the *Feres* cases does not exist in the instant case, however. There are no words in the Federal Tort Claims Act to indicate that Congress did not intend the Act to cover claims such as the one at bar. As desirable as it may be to create a "workable, consistent, and equitable whole," this may be done only if the words of the statute permit.

b. The Court, in the Feres opinion, specifically reaffirmed the Brooks holding.

As previously indicated, this Court, in *Brooks* v. *United States*, 337 U. S. 49, 53, held that veterans' compensation was not an exclusive remedy, and that despite receipt of such compensation even a soldier could recover against the United States under the Tort Claims Act if the injury occurred while he was on furlough and not subject to military discipline. In the *Feres* opinion, which the Petitioner argues was based on the exclusiveness of the compensation remedy, the Court specifically reaffirmed the *Brooks* decision. The Court said, at page 146:

> It is contended that all these considerations were before the Court in the *Brooks* case and that allowance of recovery to Brooks requires a similar holding of liability here. The actual holding in the *Brooks* case can support liability here only by ignoring the vital distinction there stated. The injury to

> Brooks did not arise out of or in the course of military duty. Brooks was on furlough, driving along the highway, under compulsion of no orders or duty and on no military mission. A government owned and operated vehicle collided with him. Brooks' father, riding in the same car, recovered for his injuries and the Government did not further contest the judgment but contended that there could be no liability to the sons, solely because they were in the Army. This Court rejected the contention, primarily because Brooks' relationship while on leave was not analogous *to that of a soldier injured while performing duties under orders.* (Italics supplied.)

The *Brooks* case was unquestionably based on the non-exclusiveness of the compensation remedy, 337 U. S. 49, 53. Re affirmation of *Brooks* in the *Feres* opinion renders unsuccessful the Petitioner's argument herein that *Feres* was based on the exclusiveness of the compensation remedy. The language of the Court, quoted above, makes it clear that the *Feres* limitation on the applicability of the Tort Claims Act extends only to "a soldier injured while performing duties under orders."

c. The argument before the Court in the Feres cases is further indication that Feres was not based on the exclusiveness of the compensation remedy.

As stated above, *Feres* v. *United States*, 340 U. S. 135 decided three cases, *Feres* v. *United States*, *Jefferson* v. *United States*, and *United States* v. *Griggs, Executrix*. An examination of the briefs filed in all three of those cases before this Court fails to reveal any place where the United States made the argument that "the existence of a comprehensive and uniform Federal system of compensation benefits" precluded recovery under the Tort Claims Act.

The principal brief filed by the United States in the three *Feres* cases was that filed in the *Griggs* case (No. 31, Supreme Court, October Term, 1950). The Outline of Argument in the *Griggs* brief sets forth the points successfully relied upon by the Government in those cases. The Government argued first that *Brooks* v. *United States*, 337 U. S. 49 was authority for denying a recovery under the Tort Claims Act to those whose injuries were incident to service. Secondly, the Government argued that the Tort Claims Act was not intended by Congress to apply to claims by servicemen for injuries incident to their service; that allowing suits on service-caused injuries would lead to consequences which Congress should not be presumed to have intended; that it would subject the Government-soldier relationship to dissimilar state laws; and that it would subject service-caused injury and death claims to judicial scrutiny and thereby impair military discipline. Finally, the Government argued that neither the language nor the statutory scheme of the Federal Tort Claims Act will permit recovery thereunder of damages resulting from a service-incident injury negligently inflicted by one member upon another member of the Armed Services.

As shown by the *Feres* opinion, these arguments were adopted by the Court. The Government's present contention, that the *Feres* decision was based upon another argument (which was not even mentioned in the Government's briefs therein) thus lacks substantial merit.

d. Subsequent decisions have not changed or modified either the Brooks or Feres holding.

The Government argues, at page 16 of its brief that "subsequent decisions fortify the view that the *Feres* case was

based on the exclusiveness of the compensation remedy." With that argument we disagree.

Johansen v. *United States*, 343 U. S. 427, cited by the Petitioner at page 16 of its brief, is inapplicable. It involved a question of workmen's compensation as provided for under the Federal Employees Compensation Act of 1916 (5 U. S. C. A. 751, *et seq.*). The Court held that having collected workmen's compensation, a civilian employee on a public vessel could not sue the United States under the Public Vessels Act of 1925 (46 U. S. C. A. 781, *et seq.*), which allowed libels in admiralty. Thus, neither the Tort Claims Act nor the Veterans Compensation Statutes were involved.

This Court in the *Brooks* case, *supra*, recognized the distinction between workmen's compensation and veterans' compensation. The Court stated, 337 U. S. 49, 53:

> Provisions in other statutes for disability payments to servicemen, and gratuity payments to their survivors, 38 U. S. C. 701, indicate no purpose to forbid tort actions under the Tort Claims Act. Unlike the usual workmen's compensation statute, e.g. 33 U. S. C. 905, there is nothing in the Tort Claims Act or the Veterans' Laws which provides for exclusiveness of remedy.

Furthermore, in the *Johansen* opinion the Court, referring to *Feres*, spoke of it as relating to "soldiers on active duty" and "those in the Armed Services." *Johansen* v. *United States*, 343 U. S. 427, 440, 441. This was recognized by the Court of Appeals below, (R. 18, footnote 2). There is nothing in the *Johansen* opinion to indicate that *Feres* had direct application to anyone but servicemen on active duty.

Dalehite v. *United States*, 346 U. S. 15, cited by Petitioner at page 17 of its brief similarly is inapplicable to the case at bar. *Dalehite* was a test case arising from the explosion of ammonium nitrate fertilizer produced under specifications and control of the United States. The Court held (syllabus, p. 15) "As a matter of law, the facts found by the District Court can not give it jurisdiction under the Act because the claim is 'based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal Agency or an employee of the government', within the meaning of 28 U. S. C. Section 2680(a) which makes the Act inapplicable to such claims."

The language of the Court, in the *Dalehite* opinion, which the Petitioner has quoted at page 17 of its brief, has again been taken piecemeal and out of context by Petitioner. The language appears in a footnote (No. 25) at 346 U. S. 15, 31. The entire footnote reads as follows:

> In *Feres* v. *United States*, 340 U. S. 135, 71 S. Ct. 153, 95 L. Ed. 152, this Court held that the Act did not waive immunity for tort actions against the United States for injuries to *three members of the Armed Forces while on active duty.* The injuries were allegedly caused by negligence of employees of the United States. The existence of a uniform compensation system for injuries to those *belonging to the Armed Services* led us to conclude that Congress had not intended to depart from this system and allow recovery by a tort action *dependent on state law. Recovery was permitted by a serviceman for non-service disabilities in Brooks* v. *United States*, 337 U. S. 49, 69 S. Ct. 918, 93 L. Ed. 1200. (Italics supplied.)

Thus the reference by this Court to *Feres*, in the *Dalehite* opinion, was restricted to "those belonging to the Armed Services." The reaffirmation of the *Brooks* decision, wherein it was held that veterans' compensation was *not* an exclusive remedy, is further proof that this Court, in *Feres*, did not rule that it was the exclusive remedy.

United States v. *Gilman*, 347 U. S. 507, cited and quoted by the Petitioner at pages 24-26 of its brief is also inapplicable to the case at bar. In *Gilman* the United States had been held liable under the Federal Tort Claims Act for negligence of a governmental employee. This was an action to recover indemnity from the employee. This Court held that such an action could not be maintained. It pointed out that the problem of indemnity was one involving broad policy considerations; the discipline of government workers, loss of time from their work, etc. The Court said that this was a problem for Congress and not for the Courts to decide. In the absence of specific Congressional authorization, the Court would not allow indemnity.

The Government's claim, in *Gilman*, was made under general law. The respondents claim herein is made under the specific terms of the Federal Tort Claims Act. In *Gilman*, allowance of the Government's claim would have created great problems involving broad policy considerations. The whole relationship between the government and its employees might have been upset. Allowance of the respondent's claim herein involves no such problems.

Lewis v. *United States*, 190 Fed. 2d. 22, *certiorari* denied, 342 U. S. 869, cited by the Petitioner at page 18 of its brief, *United States* v. *Firth*, 207 F. 2d 665, cited at page 20 of the Petitioner's brief, *Mandel* v. *United States*, 191 F. 2d 164,

affirmed *sub nom. Johansen* v. *United States*, 343 U. S. 427, cited at page 20 of Petitioner's brief, *Sasse* v. *United States*, 201 F. 2d 871, 872, cited at page 21 of Petitioner's brief, and *Sigmon* v. *United States*, 110 F. Supp. 906, 911, cited at page 20 of Petitioner's brief are similarly inapplicable to the case at bar. None of them involve the Veterans' Laws and their allegedly exclusive character. Furthermore, *Lewis* v. *United States*, *supra*, as pointed out by the Court of Appeals below (R. 18) "related to an injury to a member of the U. S. Park Police incurred while on active duty." And, in *Sigmon* v. *United States*, (D. C. V. A. 1953) 110 F. Supp. 906, 909, the Court had said:

> In the case of *Feres* v. *United States*, it was held that the United States is not liable under the Tort Claims Act for injuries to members of the Armed Services sustained while on active duty and not on furlough and resulting from the negligence of others in the Armed Forces.

Archer v. *United States* (S. D. Cal.) 112 F. Supp. 651, cited by Petitioner at page 21 of its brief, supports more than it rejects the Respondent's position herein.

The Court stated, at page 651:

> I am of the view that plaintiff can not recover. The decedent, Herman Archer, a cadet at West Point Military Academy, was, at the time of his death, travelling in a military plane, under military discipline, and was under the laws and regulations in force at the time, on military duty. His death occurred 'in the course of military duty'.

O'Neil v. *United States* (C. A. D. C.) 202 F. 2d 366, and *Pettis* v. *United States* (N. D. Cal.) 108 F. Supp. 500, cited

by the Petitioner at page 19 of its brief, misread and misinterpreted the *Feres* decision, and failed to consider this Court's reasons for excluding from the Act claims of servicemen on active duty.

3. *The Feres decision is consistent with the Brooks decision.*

When this problem first came to the Court in *Brooks* v. *United States* (1949) 337 U. S. 49, the Court was aware of the entire problem and anticipated its later holding in the *Feres* case. The Court said, at 337 U. S. 49, 52:

> We are dealing with an accident which had nothing to do with the Brooks' army careers; injuries not caused by their service except in the sense that all human events depend upon what has already transpired. Were the accident incident to the Brooks' service, a wholly different case would be presented.

In *Feres* v. *United States*, 340 U. S. 135, 138, the Court clearly recalled its words in *Brooks*. The Court said:

> The common fact underlying the three cases is that each claimant, while on active duty and not on furlough, sustained injury due to negligence of others in the Armed Forces * * *. *This* is the 'wholly different case' reserved from our decision in *Brooks* v. *United States*, 337 U. S. 49, 52.

Thus, the Court, in the *Feres* decision, made it clear where the *Feres* holding began and the *Brooks* holding ended. The *Feres* limitation on the coverage of the Tort Claims Act exists where a claimant, "while on active duty and not on furlough" sustains an injury "due to negligence of others in the Armed Forces."

This relationship between the *Brooks* and *Feres* holdings was also anticipated by Judge Parker in his dissent below

in *United States* v. *Brooks*, (C.A. 4) 169 F. 2d 840, 850. Judge Parker, whose dissenting opinion was expressly approved by this Court (*Brooks* v. *United States*, 337 U. S. 49, 51), specifically referred to one of the *Feres* cases, then pending in a lower court, when he said:

> It should be noted that the claims in suit here do not arise out of injuries connected with the military service of plaintiffs, as was the case in *Jefferson* v. *United States*, D.C., 77 F. Supp. 706. Entirely different considerations might operate to deny recovery in such case, as is suggested in the opinion of Judge Chesnut. Since the act does no more than give the right to sue the government and adopts the law of the state in which the injury has occurred with respect to the establishing of liability, the question arises, as to an injury caused by army service, whether under the law of the state there is any liability for such an injury. No such question is presented here; and the only ground upon which it could be answered in the negative does not exist with respect to an injury which has no connection with army service. In that case, liability would be held not to exist because of lack of basis in state law. Here, the only way in which liability can be avoided is to read into the statute an exception to language which admittedly covers the case, an exception which Congress evidently considered and decided not to incorporate in the act.

Respondent's claim herein contains none of the factors basic to the *Feres* limitation on the *Brooks* holding. He has a valid claim, under the *Brooks* decision. As a discharged veteran, Peter Brown was freer of military discipline than was the soldier, on furlough, in *Brooks* v. *United States*, *supra*.

4. Subsequent decisions have interpreted Feres as being limited to servicemen on active duty.

In *O'Brien* v. *United States* (C. A. 8, 1951), 192 F. 2d 948, 950, the Court said:

> In the *Feres* case * * * the plaintiffs were in Military Service on active duty and sought to maintain actions under the Tort Claims Act for injuries resulting from alleged negligent acts of representatives of the Government in the performance of their duties as such representatives. The Court held that, 'The Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.' The controlling importance of the Trial Court's finding that deceased was acting in the line of duty at the time of his fatal injury is obvious.

Similarly, in the instant case, the Court of Appeals for the Second Circuit unanimously supported respondent's position, saying (R. 18):

> We think that these facts do not bring their case within the doctrine of *Feres* v. *United States*, since no injury of which plaintiff now complains was sustained while he 'was on active duty and not on furlough'.

In *Snyder* v. *United States* (D.C. Md. 1953) 118 F. Supp. 585, 595-600, the plaintiff was an army sergeant who was off duty, on pass, when an abandoned army bomber crashed into a house in which he was present. He brought an action against the government under the Federal Tort Claims Act. The Court ruled in his favor, on the basis of *Brooks* v. *United States, supra*. The Court compared and analyzed

the *Brooks* and *Feres* decisions. It held that *Feres* was based on the fact that the claimants therein were "on active duty and not on furlough".

D. The Santana and Bandy decisions support respondent's position herein.

Santana v. *United States* (C. A. 1, 1949), 175 Fed. 2d 320, was decided by the First Circuit Court of Appeals after the *Brooks* decision, and before the *Feres* decision. This also was an action under the Federal Tort Claims Act. The plaintiffs were the heirs of Manuel Rey, a veteran who obtained admission to a Veterans Administration hospital subsequent to his discharge. The complaint alleged that he died as the result of the negligence of the employees of the hospital in caring for him. The United States argued that there was a comprehensive system of special statutory benefits for service-connected injuries; that Congress in enacting the Tort Claims Act must have intended to exclude such claims from it; that despite the general language of the act and the fact that the act itself contains twelve specific exceptions, none of which excludes an ex-serviceman from its benefits, it should be read as impliedly excluding such claims.

The District Court dismissed the complaint, but the Court of Appeals reversed. The Court of Appeals said, at page 322:

> In our opinion, the decision in the *Brooks* case has completely undermined the arguments of the Government in the case at bar * * *
>
> In the case at bar Manuel Rey was not in the service at the time of the negligence complained of. He had returned to private life as a discharged veteran

> and inclusion of his claim within the coverage of the Tort Claims Act would involve no problem of the 'subversion of military discipline'.
>
> With respect to the remaining argument that Congress presumably did not intend to include discharged veterans within the coverage of the Tort Claims Act insofar as they already are covered by a 'comprehensive system of special statutory benefits,' the Supreme Court in its decision in the *Brooks* case, in the language above quoted expressly discredited that argument even as applied to servicemen.

Similarly, *Bandy* v. *United States* (D. C. Nevada 1950), 92 Fed. Sup. 360, is directly in point and upholds the plaintiff's position in the case at bar. The plaintiff therein was a veteran who had been discharged with a rheumatic fever disability, incurred while in service. He subsequently entered a Veterans Administration Hospital to receive examination and treatment, if necessary, of the rheumatic disability. In the course of receiving heat treatments, he was placed in an electric cabinet bath. Despite his complaint, he was kept there too long. He became unconscious and suffered serious burns.

On his action brought under the Tort Claims Act, the Court rejected the government's arguments that the plaintiff had made an election of remedies by obtaining compensation under the Veteran's Compensation Act, and that his disability (the resulting scars) was a service-connected disability, for which he could not recover under the Tort Claims Act. The Court awarded $15,000 to the plaintiff.

The Government argues, at pages 23 and 24 of its brief, that these cases are entitled to no weight because both of

them were decided before this Court's decisions in *Feres* and *Johansen.*

As the Court of Appeals, below, pointed out (R. 18) this argument is untenable. *Feres* v. *United States,* the Court says is "Not in point," inasmuch as it involved claimants who were on active duty and not on furlough. *Johansen* v. *United States* was considered by the Court below 'inapposite since it involved an interpretation of quite different statutes," and since the Court therein, "referring to the Feres case," spoke of it (343 U. S. at 440) as relating to "soldiers on active duty."

II. Brown's Injury Is Not "Incident to Service" in the Sense Intended by the Court in the Brooks and Feres Decisions. He Suffered a New and Different Injury at the Veterans Administration Hospital.

The injury for which respondent now seeks compensation under the Tort Claims Act is a different and distinct injury from the one he suffered while on active duty in New Guinea. Respondent originally suffered a recurrent dislocation of the patella (R. 5). This action seeks damages for the injury to the nerves in respondent's leg and the resulting paralysis, which was caused by the defective tourniquet and the negligence of an operating-room attendant in the employ of the Veterans Administration (R. 1, 2).

To borrow the words of this Court, there is no connection between this latter injury and the respondent's military service, "except in the sense that all human events depend upon what has already transpired." *Brooks* v. *United States,* 337 U. S. 49, 52.

The Court of Appeals, below, rejected the Government's argument, stating (R. 18):

> Moreover, we do not agree with the government's contention that plaintiff's claim is to be deemed merely an aggravation of his original injury and that it is therefore to be regarded just as if it had happened while he was on active duty.

The Petitioner argues, however, at pages 41-47 of its brief that, even if the compensation remedy is not exclusive the respondent's injury was "incident to his service," and thus respondent's claim falls within the *Feres* limitation to the applicability of the Act.

The meaning of the phrase, "incident to service" is not to be found in cases involving workmen's compensation, or in administrative decisions of the Veterans Administration, as Petitioner suggests. The meaning and intent of these words is found in this Court's opinions in the *Brooks* and *Feres* cases, where the phrase was used.

As previously indicated, this Court had said, in *Brooks* v. *United States*, 337 U. S. 49, 52, "Were the accident *incident* to the Brooks' *service*, a wholly different case would be presented." In *Feres* v. *United States*, 340 U. S. 135, 138, the Court said, "The common fact underlying the three cases is that each claimant, while on active duty and not on furlough, sustained injury due to negligence of others in the Armed Forces * * * ". Then, in the same paragraph and almost immediately following this sentence, the Court said, "*This* is the 'wholly different case' reserved from our decision in *Brooks* v. *United States*, 337 U. S. 49, 52, 69 S. Ct. 918, 920, 93 L. Ed. 1200." (Italics supplied.)

Thus, it is clear that an accident "incident to service" is one which occurred while the claimant was on active duty and not on furlough, and when the injury was due to negligence of others in the Armed Forces. The reiteration by the Court, in the *Feres* case of the words, "a soldier," "those disabled in service," "injuries to servicemen," "military personnel," "service-connected injuries," "superior officers," and, "active duty" make it clear that "incident to service" means just what it says. *Feres* v. *United States*, 340 U. S. 135, 137, 138, 139, 140, 141, 143, 145, 146.

Administrative determination, whether by the Veterans Administration or by a Workmen's Compensation Board that a subsequent, hospital-caused injury is compensible under either Workmen's Compensation Statutes or Veterans Administration practice, is irrelevant to the question of what this Court meant in the *Brooks* and *Feres* decisions.

Both Workmen's Compensation and Veterans' Compensation constitute social legislation designed to protect workers and veterans. Such determinations as those cited by Petitioner at pp. 44-47 of its brief tend to effectuate the purpose of that legislation. They broaden and make secure the rights of injured persons. In this case, however, the only effect of ruling that Peter Brown's injury was "incident to his service" would be to deprive him of a remedy. It would not, in any way, effectuate a legislative purpose.

"Incident to service" as used by this Court signifies something arising out of the unique situation of military duty—military duty which is federal in character, which defies comparison to private liability, and which necessarily implies the existence of military discipline.

Furthermore, denial of Brown's claim on the ground that his injury "arose out of activity incident to his service" would render the logic of this Court, in *Brooks* and *Feres* meaningless. As the law exists now, the general language and the lack of a specific exception in the Tort Claims Act govern, *Brooks* v. *United States, supra.* If, however, the claimant was on active duty and not on furlough when his accident occurred, then, still consistent with the words of the Tort Claims Act, he may not recover, *Feres* v. *United States, supra.*

Unless the *Feres* limitation is restricted to servicemen on active duty, the law will be hopelessly confused. Assume, for example, that Brown was being treated in a Veterans Administration hospital for poison ivy contracted seven years after his discharge, when he was negligently injured. That, under the Government's logic, would not have arisen out of an activity "incident to his service" and he might recover under the Act. There is no valid reason for distinguishing between the two claims. The Government has not pointed, nor can it point, to any language in the Tort Claims Act supporting such a distinction.

Or, to take another example, assume that Brown had been hit by a Government mail truck while on Veterans' Administration Hospital grounds. Is the fact that he was there for treatment of a service-connected injury to make the difference? There is no logic to such a conclusion. The law, as it exists now under *Brooks* and *Feres*, is clear. The respondent, Peter Brown, has a remedy under the Tort Claims Act.

Conclusion

For the reason stated, it is respectfully submitted that the judgment below should be affirmed.

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